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Supreme Court, U.S.
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OFFICE OF THE CLERK

In The Supreme Court of the United States

October Term, 1994

DUQUESNE LIGHT COMPANY,

Petitioner,

v.

FREDERICK R. CLAUS,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a claim of reverse discrimination by a white employee who was passed over for a promotion should be determined by allocating the burden of proof according to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), where there is no evidence of anti-white bias and a qualified minority employee received the promotion.

2. Whether this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) forecloses an employee from asserting that his employer violated 42 U.S.C. § 1981 by denying him a promotion in retaliation for filing a charge of discrimination with the Equal Employment Opportunity Commission, where the claim arose prior to the effective date of the Civil Rights Act of 1991.

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OPINIONS IN THE COURT BELOW

The opinion of the United States Court of Appeals for the Third Circuit is unreported, and is printed in the Appendix at page 4a. The Court of Appeals' order denying Petitioner's motion for rehearing is set forth in the Appendix at page 1a.

The order of the District Court is also unreported and is set forth in the Appendix at page 12a.

JURISDICTIONAL STATEMENT

The order and judgment of the United States Court of Appeals for the Third Circuit were entered on December 9, 1994. (Appendix, p. 2a). A timely petition for rehearing was denied on January 13, 1995. (Appendix 1a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2(a)(1): It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3(a): It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this subchapter.

42 U.S.C. § 1981: All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

This petition for writ of certiorari arises out of litigation between Frederick R. Claus, Respondent (hereinafter "Claus"), and his employer, Duquesne Light Company, Petitioner (hereinafter "Duquesne Light").[1]

Claus, who is white, joined Duquesne Light in 1964. Since 1985, he has held the position of Director of Engineering. In November 1987, Claus sought a promotion to Manager, Construction and Engineering. Claus and several other Duquesne Light employees applied and were considered for the position. After initial screening, Duquesne Light interviewed six individuals, including Claus. Of those six candidates, five were white men and one was a black man.

At the time, Duquesne Light had a written affirmative action plan developed pursuant to Executive Order 11246. In Duquesne Light, managerial and executive positions historically had been dominated by white men. The affirmative action plan documented that minority managers held just two of 82 positions in the job group that included the Manager, Construction and Engineering position, and that an underutilization existed relative to the qualified labor market. In filling the Manager, Construction and Engineering position for which Claus had applied,

[1]Duquesne Light Company is a subsidiary of DQE. Duquesne Light Company has no subsidiaries.

Duquesne Light considered this underutilization and granted a preference to the minority candidate. Additionally, Claus was considered to lack managerial and interpersonal skills. In March 1988, Duquesne Light awarded the promotion to the minority candidate, James Griffin, whom the jury found to be qualified for the position.

In October 1988, Claus filed a charge with the Equal Employment Opportunity Commission (''EEOC'') alleging that he was the victim of race discrimination.

In May 1989, Claus sought promotion to another position—Manager, Construction Coordination and Underground. When he did not receive that promotion, Claus filed a second charge of discrimination with the EEOC, this time alleging unlawful retaliation for having filed the earlier EEOC charge.

On July 10, 1990, Claus filed a complaint against Duquesne Light in the United States District Court for the Western District of Pennsylvania, claiming that Duquesne Light had denied him the promotion in 1988 because he was white in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (''Title VII''), and 42 U.S.C. § 1981 (''Section 1981''). Claus sought instatement and back pay under Title VII, as well as compensatory and punitive damages under Section 1981.

In July 1991, Claus amended his complaint to allege that Duquesne Light also violated Title VII and Section 1981 by denying him the second promotion in May 1989 in retaliation for having filed the discrimination charge concerning denial of the first promotion.

The case proceeded to trial in December 1993 prior to this Court's decision in *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994), and *Rivers v. Roadway Express, Inc.*, 114 S.Ct. 1510 (1994), and although the facts and the commencement of

the suit predated enactment of the Civil Rights Act of 1991, P.L. 102-166, 105 Stat. 1071 (''1991 Act''), the trial court applied the 1991 Act to the case. The jury returned special verdicts finding that the minority candidate who received the job was qualified, that Griffin was not promoted in accordance with the employer's valid affirmative action plan, and that if Griffin had not been promoted then Claus would have been. Based on these findings, the trial court awarded Claus instatement and backpay. The jury awarded compensatory damages in the amount of $5,000 with respect to the denial of promotion in 1988, and compensatory damages of $20,000 and punitive damages of $400,000 with respect to the denial of promotion in 1989. Duquesne Light filed a motion for judgment after trial, or in the alternative for a new trial or to amend judgment, which the trial court denied on January 7, 1994.

On February 3, 1994, Duquesne Light appealed to the United States Court of Appeals for the Third Circuit. On December 9, 1994, the Court of Appeals affirmed the judgment and order of the District Court in a memorandum opinion not for publication. A timely motion for rehearing was denied on January 13, 1995.

ARGUMENT

I. Allocating the Burden of Proof According to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), on a Claim of Reverse Discrimination is Improper Where No Evidence of Anti-White Bias Was Presented and a Qualified Minority Was Selected.

The Court of Appeals held that because Duquesne Light afforded the minority candidate a preference based on his race, the decision not to promote Claus was properly analyzed as a mixed-motive case under *Price Waterhouse v. Hopkins* 490 U.S. 228 (1989), even though there was no evidence of anti-white

bias and the jury found the successful minority candidate was qualified for the position.

In *Price Waterhouse v. Hopkins*, the Supreme Court addressed the burden of proof in so-called "mixed-motive" cases—*i.e.*, cases in which an employment decision is based on both discriminatory and nondiscriminatory reasons. A six-justice majority held that, in certain circumstances, the burden of persuasion shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision absent discrimination. The majority divided, however, on the type and amount of proof necessary to shift the burden of persuasion to the employer. The plurality suggested the burden of proof shifts when the plaintiff shows that discrimination played "a motivating part in an employment decision." 490 U.S. at 244-45. Justices White and O'Connor opined that the burden shifts when the plaintiff shows unlawful discrimination was a "substantial factor" in the employer's decision. *Id.* at 259. Justice O'Connor additionally suggested that the burden shifts only upon proof by direct evidence that discrimination was a substantial factor. *Id.* at 276.

Whatever quantum of proof may be necessary to impose the burden of persuasion on the employer, the Court of Appeals here found that requirement to have been met, and concluded this was a "mixed-motive" case. In effect, the Court of Appeals, like the trial court, erroneously equated evidence of a preference afforded the successful minority candidate with racial animus against Claus. To the contrary, however, the record in this case is devoid of any evidence of racial bias against Claus, or against white persons generally.

Price Waterhouse does not hold that a preference for a qualified minority candidate constitutes evidence of unlawful bias against a majority candidate. In order to impose the burden of persuasion on Duquesne Light, *Price Waterhouse* requires that

the record reflect *Claus' race* played a substantial or motivating factor in his failure to receive the promotion he sought. The record is devoid of evidence that Claus' race was any factor. Indeed, the record reflects that Duquesne Light had employed predominantly white managers.

Moreover, application of *Price Waterhouse* on these facts cannot be reconciled with *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987). In *Johnson*, this Court held that the analytical framework of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), applies to affirmative action plan cases. Under the *McDonnell Douglas* analytical framework, the initial question is whether the plaintiff established a prima facie case. In an affirmative action plan case, the reverse discrimination plaintiff is likely to adduce evidence of a preference afforded a minority or female individual. Although an employer is required to articulate one or more legitimate, non-discriminatory reasons for its actions once plaintiff has made out a prima facie case, *McDonnell Douglas* and *Johnson* require that the burden of persuasion stay with the plaintiff.

In this case, the Court of Appeals imposed the burden of persuasion on Duquesne Light because the company afforded a preference to a minority employee. Thus, the Court of Appeals effectively ruled that evidence of a prima facie case under *McDonnell Douglas* was sufficient proof of unlawful motive to shift the burden of persuasion to the employer under *Price Waterhouse*—an irreconcilable result. If a preference for a qualified minority candidate is sufficient to shift the burden of persuasion, then every reverse discrimination plaintiff who proves an affirmative action preference has proven sufficient unlawful motive to apply *Price Waterhouse*, effectively emasculating *Johnson*.

Finally, application of *Price Waterhouse* here produced the anomalous result that a clearly articulated, non-discriminatory

reason for Duquesne Light's decision not to promote Claus in March 1988—i.e., the judgment that he lacked managerial and interpersonal skills—was considered by the jury only from the perspective that Duquesne Light had the burden of proving that Claus would not have been promoted in any event, rather than from the perspective that Claus bore the burden of proving he was denied the promotion because of his race. Duquesne Light was entitled to have this non-discriminatory reason determined under the analysis set forth in *McDonnell Douglas* and its progeny.

II. The Decision of the Court of Appeals That Claus' Retaliation Claim was Actionable Under Section 1981 is in Conflict With Decisions of Other Courts of Appeal on the Same Subject and is Inconsistent with This Court's Decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

In the Court of Appeals, Duquesne Light argued on the basis of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and *Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510 (1994), that Section 1981 did not apply to Claus' claim of unlawful retaliation for having filed an EEOC charge. Furthermore, Duquesne Light cited supporting authority from every circuit court of appeals decision which has addressed the issue since *Patterson*. *See Williams v. First Union National Bank of North Carolina*, 920 F.2d 232 (4th Cir. 1990), *cert. denied*, 500 U.S. 953 (1991); *Carter v. South Central Bell*, 912 F.2d 832 (5th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991); *Overby v. Chevron USA Inc.*, 884 F.2d 470 (9th Cir. 1989).

The Court of Appeals for the Third Circuit here declined to follow the other courts of appeal, writing instead that "the better reasoned cases have refused to limit the actionability of retaliation claims under § 1981." Memorandum Opinion, p. 9a. All the cases on which the Third Circuit relied, however, were decided

before this Court's decision in *Patterson. See, e.g., Choudhury v. Polytechnic Institute of New York,* 735 F.2d 38 (2d Cir. 1984); *Sester v. Novack Investment Co.,* 638 F.2d 1137 (8th Cir. 1981), *cert. denied,* 454 U.S. 1064 (1981); *Goff v. Continental Oil Co.,* 678 F.2d 593 (5th Cir. 1982); *Winston v. Lear-Siegler,* 558 F.2d 1266 (6th Cir. 1977). In fact, one of the cases cited and relied upon by the Court of Appeals, *Goff v. Continental Oil Co.,* was specifically held by the Fifth Circuit not to have survived *Patterson. See Carter v. South Central Bell.*

Without question *Patterson* limited the scope of Section 1981's protection of the right to "make and enforce contracts," and held that this language "cannot be construed as a general proscription of racial discrimination in all aspects of contract relations." *Patterson,* 491 U.S. at 176. Specifically, this Court reasoned that the right to "make" contracts "extends only to the formation of a contract," and "not to problems that may arise later." *Id.* Regarding employment contracts in particular, the Court stated that the right to "make" contracts does not extend "to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions." *Id.* at 177.

With respect to Section 1981's guarantee of the right to "enforce" contracts, the Court found that "[i]t . . . covers wholly private efforts to impede access to the courts or obstruct non-judicial methods of adjudicating disputes about the force of binding obligations." 491 U.S. at 177. The Court, however, indicated the right is limited:

> The right to enforce contracts does not, however, extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her *established contract rights.*

Id. at 177-78 (emphasis added). Under this language, retaliation claims for filing administrative charges under Title VII or other fair employment statutes ceased to be actionable under Section 1981.

After *Patterson*, the critical inquiry under Section 1981's protection of the right to "enforce" contracts centers on whether the employer's conduct "impairs an employee's ability to enforce through legal process his or her established contract rights." 491 U.S. at 177-78. Where an employer acts against an employee in retaliation for the employee's filing of a charge with the EEOC, the employer does not impair the employee's access to that remedy. Even if retaliatory conduct could be said to impair an employee's willingness to access the legal process, there is no impairment to the employee's ability to do so.

The Court in *Patterson* was also concerned with the substantial overlap between Title VII and Section 1981. Although noting that "some overlap will remain between the statutes," the Court nonetheless expressed reluctance "to read [Section 1981] broadly where the result is to circumvent the detailed remedial scheme constructed in [Title VII]." 491 U.S. at 181-82. Retaliatory conduct is specifically proscribed by Title VII. *See* 42 U.S.C. § 2000e-3(a). This was noted by the Courts of Appeals in *Overby*, 884 F.2d at 473, and in *Carter*, 912 F.2d at 840, in their holdings that Section 1981 does not reach retaliatory conduct.

There is an unmistakable distinction between retaliation for enforcing a contract right and a retaliation for enforcing a right provided under the civil rights laws. This Court was explicit in *Patterson* that Section 1981's guarantee of the right to "enforce" contracts did not extend beyond employer conduct impairing an employee's ability to enforce "his or her established contract rights." Claus did not claim Duquesne Light retaliated against him for his efforts to enforce a specific contract

right. He instead claimed that he was retaliated against for exercising the right to file an EEOC charge, a statutory right, not a contract right.

Based on the authority cited above, Section 1981's guarantee of the right to enforce contracts does not extend to the filing of an EEOC charge. *Carter v. South Central Bell; Overby v. Chevron USA Inc.*. For this reason, the holding of the Court of Appeals in this case is in error, and in conflict with the decisions of other Courts of Appeal which have interpreted *Patterson* to preclude such a claim.

CONCLUSION

Since there was no evidence that Duquesne Light denied Claus promotion in 1988 because of his race, and since the minority employee who received the promotion was qualified, the decision to shift the burden of persuasion to Duquesne Light under *Price Waterhouse* was unwarranted and inconsistent with this Court's decision in *Johnson v. Transportation Agency*. Further, the Court of Appeals holding that Claus' retaliation claim was actionable under Section 1981 is in conflict with the decisions of all other circuits which have interpreted *Patterson* to preclude such a claim. For these reasons, Duquesne Light requests this Court to grant certiorari review.

Respectfully submitted,

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APPENDIX

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1. Order of the United States Court of Appeals for the Third Circuit, dated January 13, 1995, denying petition for panel rehearing with suggestion for rehearing in banc 1a
2. Judgment of the United States Court of Appeals for the Third Circuit, dated December 9, 1994, affirming the decision of the United States District Court, for the Western District of Pennsylvania 2a
3. Memorandum Opinion of the United States Court of Appeals for the Third Circuit dated December 9, 1994 ..... 4a
4. Memorandum Order of the United States District Court for the Western District of Pennsylvania dated December 20, 1993. ..... 12a

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3052

FREDERICK R. CLAUS
v.
DUQUESNE LIGHT COMPANY,
Appellant

(D.C. Civ. No. 90-cv-01149)

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, SAROKIN, *Circuit Judges* and POLLAK *District Judge**

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Appellant, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

DATED: January 13, 1995

*. As to panel rehearing only.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3052

FREDERICK R. CLAUS
v.
DUQUESNE LIGHT COMPANY,
Appellant

On Appeal From the United States District Court
For the Western District of Pennsylvania
D.C. Civ. No. 90-cv-01149
(District Judge: Honorable William L. Standish)

Argued: September 20, 1994

Before: BECKER, and COWEN, *Circuit Judges*, and POLLAK, *District Judge*.*

JUDGMENT

This case came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted on September 20, 1994. On consideration whereof, it is now here

ORDERED AND ADJUDGED by this court that the judgment and orders of the district court of December 21, 1993 and January 4, 1994 respectively be and the same are hereby affirmed.

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*. Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Costs taxed against the appellant.

ATTEST:

_____

Clerk

DATED: December 9, 1994

Costs taxed against appellant as follows:

Brief $112.60

TOTAL $112.60

Certified as a true copy and issued in lieu of a formal mandate on January 23, 1995.

Teste:

Clerk, U.S. Court of Appeals for the Third Circuit.

NOT-FOR-PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3052

FREDERICK R. CLAUS
v.
DUQUESNE LIGHT COMPANY,
Appellant

On Appeal From the United States District Court
For the Western District of Pennsylvania
D.C. Civ. No. 90-cv-01149
(District Judge: Honorable William L. Standish)

Argued: September 20, 1994

Before: BECKER, and COWEN, *Circuit Judges*, and
POLLAK, *District Judge*.*

(Filed December 9, 1994)

MEMORANDUM OPINION

BECKER, *Circuit Judge*.

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*. Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

This is an appeal by defendant Duquesne Light Company from a judgment of the district court entered following a jury verdict, and awarding back pay, promotion, compensatory and punitive damages to plaintiff Frederick R. Claus, a white employee who charged that he was denied a promotion in 1988 because of racial (reverse) discrimination, and that he was again denied a promotion in 1989 in retaliation for a charge he had filed with the EEOC with respect to the 1988 promotion. Duquesne also appeals from an order denying post trial motions. Duquesne argues that the district court erred by not awarding it judgment after trial on the grounds that there was insufficient evidence to support either the reverse discrimination claim or the retaliation claim under both Title VII and 42 U.S.C. 1981. Duquesne also contests several aspects of the jury instructions. Finally, Duquesne claims that it should have been granted judgment after trial based on what it alleged was the retroactive application of the Civil Rights Act of 1991. We affirm.

I.

Duquesne first contends that the district court improperly denied its motion for judgment after trial on Claus' race discrimination claim because the evidence was insufficient to prove that Claus was not promoted because of his race. We disagree. A jury rendered a verdict in this case, and thus our scope of review is exceedingly narrow, *Rotondo v. Keene Corp.*, 956 F.2d 436, 438 (3d Cir. 1992) (court of appeals should affirm the denial of a motion for j.n.o.v. "'unless the record is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief.'") We are satisfied that Duquesne did not surmount that difficult burden. The core flaw in Duquesne's argument is the fact that, although it sought to justify the March 1, 1988 promotion of James Griffin over plaintiff to the vacant position of Manager, Construction and Engineering ("Manager C & E") on the grounds of affirmative action, there is testimony

by the manager responsible for the disputed promotion decision that, although Griffin's race was a determinative factor, the decision was NOT made pursuant to Duquesne's affirmative action plan. Duquesne attempted unsuccessfully to nuance the problem at oral argument. We conclude that the jury was entitled to rely on its manager's testimony.

There is some dispute as to the analytical framework in which plaintiff's Title VII claims should be considered. Duquesne claims that, because the promotion was made pursuant to an affirmative action plan, *Johnson v. Transportation Agency, Sta. Clara*, 480 U.S. 616 (1987), governs and places this case within the *McDonnell Douglas/Burdine/Hicks* framework. From this, Duquesne reasons that plaintiff bore the burden of proving that unlawful discrimination was the real reason for the denial of promotion or that the plan was invalid.

However, as we have already noted, this case does not present a disputed employment decision made pursuant to a plan. Instead, Duquesne's managers offered two reasons why Claus did not receive the promotion: in addition to the consideration of race, the managers also claimed that Claus lacked the necessary managerial and interpersonal skills. This case thus presents a *Price Waterhouse*,[1] mixed motives paradigm: race played a role (though not, according to the defendant's own testimony, pursuant to a valid affirmative action plan), but the defendant also offered a legitimate non-discriminatory reason for its action. Under *Price Waterhouse*, the *defendant* bears the burden of proving that discrimination was *not* the real reason. As explained above, plaintiff obviously "proved that [race] played a motivating part in an employment decision." *Price Waterhouse, supra*, 490 U.S. at 258; *Griffiths v. CIGNA Corp.*, 988 F.2d 457, 469 (3d Cir. 1993). Thus, Duquesne's argument that it was entitled to

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[1]*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

judgment after trial because plaintiff did not bear its burden is patently groundless.[2]

There is also sufficient evidence to uphold the jury's verdict with respect to the claim arising out of the 1989 failure to promote plaintiff to the position of Manager, Construction Coordination and Underground, Western Division ("Manager CC & U"). Plaintiff asserts that the failure to promote him was in retaliation for his filing the claim arising out of the Manager C & E promotion. Duquesne claimed that plaintiff did not get the 1989 promotion because of a series of personnel shifts that resulted in another man, Richard Nickel, getting the job. Plaintiff presented a substantial amount of circumstantial evidence, including an unusually long deliberation period by Nickel, the fact that Claus' superior did not at first tell him he had offered the job to someone else, the questionable qualifications of Nickel, and a several-day meeting among high level managers from which absolutely no notes were made, that would justify an inference that the personnel shifts occurred only in response to Claus' request for that promotion. The jury obviously disbelieved Duquesne's explanation. The evidence is not abundant, but, under the narrow scope of review, we cannot say it was insufficient as a matter of law.

II.

Duquesne next claims that the district court improperly denied Duquesne's motion for judgment after trial on plaintiff's claims under 42 U.S.C. § 1981 because plaintiff failed to prove that the promotions he sought would have created a "new and

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[2]Duquesne also claims that Claus failed to prove that the affirmative action plan was either invalid or pretext. That would have been Claus' burden if Duquesne had relied on the plan in promoting Griffin. But because *Price Waterhouse* governs this case, this was not Claus' burden at trial. But even if this is a pretext *(Burdine/Hicks)* case rather than a mixed motive *(Price Waterhouse)* case, the jury could have found, based upon the evidence that the alleged lack of interpersonal skills was pretextual.

distinct'' relation with Duquesne. *See Patterson v. McLean Credit Union,* 491 U.S. 164 (1989).[3] The question whether the positions of Manager C & E and Manager CC & U would have created a ''new and distinct relationship'' is a legal one, and our review is therefore plenary. *Bennun v. Rutgers State University,* 941 F.2d 154, 169 (3d Cir. 1991). While the issue is close, we are satisfied that the transition from plaintiff's existing job as an engineer to either of the other jobs would have involved significantly different responsibilities and relationships. Both of the promotions would have elevated Claus from a practicing engineer to the ranks of senior management, giving him supervisory responsibility over 250 employees in the case of the Manager C & E position or over 105 employees in the case of the Manager CC & U position and endowing him with very substantial budgetary responsibility in either case. Such profound distinctions in day-to-day functions are clearly distinguishable from the marginal differences in power rejected in *Bennun,* where the only difference between the academic ranks was the eligibility to vote on tenure decisions.

III.

Duquesne next contends that the district court improperly denied Duquesne's motion for judgment after trial on Claus' retaliation claim under 42 U.S.C. § 1981 because that statute did not apply to that claim. Duquesne relies on cases from other circuits which have restricted the application of § 1981 to those

[3]Plaintiff has claimed unlawful denials of promotion to Manager, C & E in 1988 and to Manager, CC & U in 1989 under both Title VII and Section 1981. Both of these claims arose before enactment of the 1991 Act, which the district court, in a commendable excess of caution, applied. In *Rivers v. Roadway Express Inc.,* 62 U.S.L.W. 4271 (U.S. Apr. 26, 1994) (No. 92-938), the Supreme Court held that Section 101 of the 1991 Act, which amended Section 1981 and expanded its scope to all aspects of contractual employment relationships, does not apply to cases arising before its enactment. Hence, we apply *Patterson* to determine the availability of compensatory and punitive damages under § 1981.

retaliation claims where the employer attempts to discourage the use of the legal process. *See Overby v. Chevron USA. Inc.*, 884 F.2d 470 (9th Cir. 1989); *Williams v. First Union National Bank of North Carolina*, 920 F.2d 232 (4th Cir. 1990); *cert. denied*, 111 S. Ct. 353 (1991) (retaliatory employer conduct falls under Section 1981 only when employer aims to prevent or discourage use of legal process to enforce specific contract right); *Carter v. South Central Bell*, 912 F.2d 832 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991) (employer which allegedly retaliated did not impair or impede employee's ability to enforce contract).

We decline to follow these courts, thinking that the better reasoned cases have refused to limit the actionability of retaliation claims under § 1981. For example, we rely on *Choudhury v. Polytechnic Institute of New York*, 735 F.2d 38, 43 (2d Cir. 1984), where the court observed that "[a]n employee who is punished for seeking administrative or judicial relief, regardless of the merits of his initial claim, has failed to secure that right to equal treatment which constitutes the fundamental promise of § 1981." *See also Goff v. Continental Oil Co.*, 678 F.2d 593, 599 (5th Cir. 1982) (observing that it is "impossible completely to disassociate the retaliation claim from the underlying charge of discrimination);" *Setser v. Novack Investment Co.*, 638 F.2d 1137, 1146 (8th Cir.), *cert. denied*, 454 U.S. 1064 (1984) (explaining that retaliation is "inherent . . . in the nature of a racial situation."); *Winston v. Lear-Siegler Inc.*, 558 F.2d 1266, 1268 (6th Cir. 1977) ("While the appellant was not fired because of his race, it was a racial situation in which he became involved that resulted in his discharge from his employment."). Thus, we reject Duquesne's claim that retaliation is not actionable under § 1981.

IV.

The foregoing discussion has addressed Duquesne's most substantial claims. In addition, Duquesne claims that it is entitled

to a new trial because the district court erroneously instructed the jury on affirmative action and on the burden of proof. We have considered these claims but find them lacking in merit. Duquesne also argues that it is entitled to a new trial or amendment of the judgment because the district court erred in applying the Civil Rights Act of 1991 to this case. More specifically, Duquesne contends that the district court erred in instructing the jury that compensatory and punitive damages could be awarded under Title VII. To be sure, in the damages phase of this case, the district court instructed the jury without distinguishing between Title VII and Section 1981 claims. Duquesne argues that this failure to distinguish prejudiced them because 42 U.S.C. § 1981 does not apply either to promotion claims (unless the promotions create a "new and distinct" relation) or to retaliation claims. But as we have concluded, the new and distinct relation test has been met, and this circuit will not limit the actionability of retaliation claims under § 1981.

Because the jury could have awarded the damages under either statute (assuming retroactivity of the Civil Rights Act of 1991 as the district court did), the court's conflation of the instruction was harmless. The Supreme Court's subsequent ruling in *Rivers v. Roadway Express, Inc.*, 62 U.S.L.W. 4271 (Apr. 26, 1994); (no. 92-938), only clarifies that the damages must constitute an award under § 1981. Thus, Duquesne's attack on the instruction is also baseless.

The challenged judgment and orders of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

BY THE COURT:

/s/ Edward R. Becker

Circuit Judge

DATED:

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FREDERICK R. CLAUS,
an individual
Plaintiff,

vs.

DUQUESNE LIGHT COMPANY,
a corporation,

Civil Action No. 90-1149

MEMORANDUM ORDER

I

Plaintiff, Frederick R. Claus, in this civil action, asserted claims against defendant, Duquesne Light Company, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, (Title VII) and 42 U.S.C. § 1981 (Section 1981).

Count I of plaintiff's amended complaint asserted claims against defendant under Title VII arising out of the failure of defendant to promote plaintiff to the position of Manager, Construction and Engineering, in March, 1988. Count III of the amended complaint asserted a claim against defendant under Section 1981 arising out of the same conduct by defendant. Count II of the amended complaint asserted a claim against defendant under Title VII for the failure of defendant to promote plaintiff to the postion of Manager, Construction, Coordination and Underground May, 1989. Count III of the amended complaint alleged a claim against defendant under Section 1981 arising out of the same conduct.

The action was tried before a jury beginning November 29, 1993 and ending December 14, 1993. The jury returned special verdicts on the issue of liability on December 10, 1993, in favor of plaintiff and against defendant on the issue of liability, finding that defendant was liable to plaintiff on all of the claims asserted by plaintiff against defendant in Counts I, II and III of the amended complaint. On December 14, 1993, the jury returned special verdicts on the issue of damages finding that plaintiff was liable to defendant for compensatory damages in the sum of $5,000.00 on the claims asserted in Counts I and III of the amended complaint, and in the amount of $20,000.00 in compensatory damages on the claims asserted in II and III of the amended complaint. The jury further found that plaintiff was entitled to punitive damages from defendant in the amount of $400,000.00 on the claims asserted in Counts II and III of the amended complaint.

With respect to the claims asserted in Counts I and III of the amended complaint, the parties have stipulated that plaintiff is entitled to an award of backpay, including interest thereon, in the sum of $64,304.59. The parties also stipulate that, on the claims asserted in Counts I and III of the complaint, plaintiff is entitled to an order directing that defendant promote plaintiff from salary grade 19 to salary grade 21, effective January 1, 1994, with a monthly gross salary of $7,417.00 per month, beginning on that date. The parties further stipulate that, as to the claims asserted in Counts II and III of the amended complaint, defendant should be enjoined and prohibited from retaliating further against plaintiff with respect to the terms and conditions of his employment as a result of his having filed a charge of discrimination with the Equal Employment Opportunity Commission.

III

In light of the foregoing, the Clerk will be directed to enter judgment in favor of plaintiff and against defendant pursuant to

Fed.R.Civ.P. 58(2) on the jury's special verdicts which shall incorporate the equitable relief to which plaintiff is entitled pursuant to the stipulations of the parties.

IV

AND NOW, this 20th day of December, 1993, it is, accordingly, hereby ORDERED as follows:

1. Judgment shall be entered on the claims asserted in Counts I and III of the second amended complaint in favor of plaintiff, Frederick R. Claus, and against defendant, Duquesne Light Company, in the sum of $69,304.59, representing backpay in the sum of $64,304.59, as stipulated by the parties, and compensatory damages in the sum of $5,000.00 in accordance with the special verdict of the jury.

2. Judgment shall be entered on the claims asserted in Counts II and III of the amended complaint in favor of plaintiff and against defendant in the sum of $420,000.00, representing compensatory damages in the sum of $20,000.00 and punitive damages in the sum of $400,000.00 pursuant to the special verdicts of the jury.

3. In accordance with the stipulation of the parties as to the claims asserted in Counts I and III of the second amended complaint, the defendant shall promote plaintiff, effective January 1, 1994, from salary grade 19 to salary grade 21, and shall establish a monthly gross salary at salary grade 21 in the sum of $7,417.00 per month beginning January 1, 1994.

4. In accordance with the stipulation of the parties as to the claims asserted in Counts II and III of the amended complaint, the defendant shall be, and hereby is, enjoined and prohibited from retaliating further against plaintiff with respect the terms and conditions of his employment as a result of his having filed a

charge of discrimination with the Equal Employment Opportunity Commission.

5. The Clerk shall notify the parties of the entry of judgment in accordance herewith.

/s/ William L. Standish

William L. Standish
United States District Judge

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Supreme Court, U.S.
FILED
MAR 24 1995
OFFICE OF THE CLERK

(2)

94-1502

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

DUQUESNE LIGHT COMPANY,

Petitioner,

v.

FREDERICK R. CLAUS,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

BRIEF IN OPPOSITION

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STATUTORY PROVISIONS INVOLVED

The Civil Rights Act Amendments of 1991, Pub. L. 102-166, Title I, § 101, Nov. 21, 1991, 105 Stat. 1071, designated then existing 42 U.S.C. § 1981 as subsection (a) and added subsections (b) and (c):

42 U.S.C. § 1981. **Equal rights under the law**

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

COUNTERSTATEMENT OF THE CASE

A. The Case in General

In this employment discrimination case filed in the United States District Court for the Western District of Pennsylvania, plaintiff Claus alleged that he had been denied promotion to the vacant position of Manager, Construction and Engineering, Eastern Division ("MCE") on March 1, 1988 because his employer, Duquesne Light, promoted James A. Griffin ("Griffin") to that position because of Griffin's race, black. Claus brought suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*. (Count I) and under 42 U.S.C. § 1981 (Count II).

Claus then filed an amended complaint on July 31, 1991, alleging that he had been denied promotion to a second vacant position, Manager, Construction Coordination and Underground, Western Division ("MCCU") in retaliation for his having filed an EEOC complaint as a result of the MCE promotion denial. Claus again invoked both Title VII and 42 U.S.C. § 1981. After enactment of the Civil Rights Act Amendments of 1991, Pub. L. 102-166, Claus amended his complaint to claim damages available under that Act.

When the case came to trial in November, 1993, the District Court (Standish, J.) decided that the best procedure

was to try the case to a jury as if the CRA of 1991 were fully retroactive. The District Court believed that trial as if the CRA of 1991 were retroactively applicable would make it possible to avoid a retrial regardless of the retroactivity decision of this Court in *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994), and *Rivers v. Roadway Express*, Inc., 114 S.Ct. 1510 (1994). Both of the CRA of 1991 retroactivity cases, *Landgraf* and *Rivers*, had been argued in this Court and were pending decision. The District Court stated that if, however, the case were tried as if the CRA of 1991 were not retroactive and this Court then held the CRA of 1991 retroactively applicable, a retrial would be unavoidable. Conservation of judicial resources, therefore, counseled that the case should be tried as if the CRA of 1991 were fully applicable.

The case was then tried before Judge Standish and a jury from November 30, 1993 to December 14, 1993. The case was bifurcated between liability and damages. The jury, at the conclusion of the liability phase, was provided a special verdict slip with four separate questions which the jury answered as follows:

1. Do you find that the defendant employee, James Griffin, was qualified for promotion to the position of Manager, Construction & Engineering, when defendant promoted him to that position in March, 1988?

Jury's Answer: Yes.

2. Do you find that when defendant promoted its employee, James Griffin, to the position of Manager, Construction & Engineering, in March, 1988, defendant did so in accordance with its valid, written Affirmative Action Plan?

Jury's Answer: No.

3. Do you find that if defendant had not promoted its employee, James Griffin, to the position of Manager, Construction & Engineering, it would not have promoted plaintiff to that position?

Jury's Answer: No.

4. Did you find that plaintiff's filing or pursuit of a claim against defendant before the Equal Employment Opportunity Commission was a determining factor in defendant's decision not to promote plaintiff to the position of Manager, Construction Coordination & Underground?

Jury's Answer: Yes.

Based on the jury's answers, Judge Standish concluded that plaintiff had established liability on both the failure to promote to MCE claim and the retaliation claim.

The case then proceeded to a trial on damages. The parties stipulated to the amount of back pay with interest

($64,304.59) and the amount by which Claus' income would be increased in the future. The jury on December 14, 1993 returned the following damage verdict in favor of Claus:

On failure to promote to MCE position:	
Compensatory:	$ 5,000
On failure to promote to MCCU position:	
Compensatory	$ 20,000
Punitive	$ 400,000

The District Court then molded the jury's verdicts and entered judgment on December 21, 1993.

B. MCE Promotion Claim: Racial Discrimination

Claus at the time of trial had worked for DLCO for 29 years and 10 months. He graduated from the University of Pittsburgh in 1964 with a degree of bachelor of science in electrical engineering. During his career with DLCO, he had occupied a variety of positions within the Transmission & Distribution Division ("T&D"), chiefly performing

engineering work. "Transmission" refers to the process of bringing electrical power from the power plant to a local distribution center; "distribution" refers to the process of bringing electrical power from the distribution center to the user.

In November, 1987, the position of MCE, Eastern Division, became vacant. Claus was at that time the Director of Engineering of the Western Division of the Marketing and Customer Services Group. Claus' position was a Pay Level 19 position; the MCE position was a Pay Level 21 position. Claus applied in writing for promotion to the MCE vacancy.

Five DLCO employees were considered for the MCE position. Four candidates were white; one (James Griffin) was black. The written job description for the MCE position, last reviewed and revised in May, 1987, set forth six "Qualifications" for the job. The first two were:

> 1. Bachelor of Science degree in engineering.
>
> 2. Seven years' experience in transmission and distribution design, construction and maintenance, or operation work with three years' supervisory experience.

Claus and the other white candidates all possessed these two qualifications. Griffin, the black, did not. He had neither an engineering degree nor had he ever worked in a T&D function. Griffin had been put forward for consideration by

Joseph Zagorski, at the time the Manager of Human Resources of the Marketing & Customer Services Group.

Thomas Nist, the Manager of the Eastern Division, interviewed the present supervisors of all five candidates. Based on the supervisors' evaluations, Claus was rated second and Griffin was rated last. Under the evaluation category of "Minimum Qualifications," Griffin's then supervisor gave him a 2 out of 5, which translates on DLCO's rating scale into "less than acceptable." Claus under the same category had a 5 out of 5, which translates "much more than acceptable."

Nist then personally interviewed the candidates. Nist ranked one Richard Sikora most qualified. He ranked Claus second. Nist ranked Griffin next to last, and again gave him a "less than acceptable" rating (2 out of 5) in the "Minimum Qualifications" category.

Nist then met with his superior, Roger D. Beck, Vice-President of the Marketing & Customer Services Group, to discuss the promotion. Beck told Nist that higher management in DLCO had decided to appoint Sikora to a position other than MCE in the near future, and that Sikora was, therefore, "basically eliminated" from consideration. The removal of Sikora as a candidate moved Claus into first place.

Beck and Nist then discussed promoting Griffin to the MCE vacancy because he was a black, notwithstanding

his inability to satisfy the first two "Qualifications."

Nist then on February 12, 1988 promoted Griffin to the MCE position. In his trial testimony, Nist candidly acknowledged that Griffin's race was a factor, and that had Griffin not been black, then Nist would not have promoted him to MCE:

> Q. .... So the fact that Mr. Griffin was a black was a factor in your decision to promote him to the vacant position, isn't that correct?
>
> A. Yes, it was.
>
> Q. If Mr. Griffin had not been black at all and had been white, Mr. Nist, would you have promoted him to the vacant position without an engineering degree and without any experience in transmission and distribution?
>
> A. I didn't face that particular decision. Had he not been a minority, I would have selected Mr. Sikora.

DLCO in April, 1983 entered into a Consent Decree with the federal EEOC to resolve pending employment discrimination litigation. DLCO under the terms of that Consent Decree was required to adopt a written Affirmative Action Plan pursuant to Executive Order 11246. Each Affirmative Action Plan had a duration of one year, and was

followed by a successor Plan. Only one Affirmative Action Plan was in force at any one time.

At the time of the Griffin promotion to MCE, DLCO had in effect an Affirmative Action Plan. DLCO did not, however, make the Griffin promotion pursuant to the Plan. Beck, Vice-President of Marketing & Customer Services, so testified:

> Q. I would like to show you an interrogatory question and answer of Duquesne Light Company. Would you turn to interrogatory eleven? The Interrogatories are there and the answers are on the next page.
>
> A. Okay.
>
> * * *
>
> Q. I would like you to read question eleven and the answer to question eleven, please?
>
> "A. Identify the Affirmative Action Plan utilized in the selection and promotion of James A. Griffin to the position of Manager, Construction and Engineering Department, Eastern Division.
>
> **Answer**: Duquesne Light objects to this interrogatory on the grounds that it did not use any Affirmative Action

> Plan to select or promote Mr. Griffin. Duquesne Light states, however, that its Affirmative Action Plan often is considered in connection with the filling of vacancies in its workforce and was considered with respect to the vacancy for Manger, Construction & Engineering, Eastern Division, which Mr. Griffin filled. The Affirmative Action Plan in effect at that time was the plan covering the period March 1, 1987, to February 28, 1988."
>
> Q. And is that answer correct?
>
> A. Yes, sir.
>
> Q. Duquesne Light did not use its Affirmative Action Plan to promote Mr. Griffin?
>
> A. That's correct.

Under a provision of the Affirmative Action Plan, DLCO was required to complete reports showing what actions had been taken pursuant to the Plan. No report or reports prepared under the Affirmative Action Plan concerning the Griffin promotion could be located by DLCO and none were therefore introduced at trial.

Donald O. Messner, who in 1987-1988 was the Vice-President of the Administrative Services Group, testified that he was the official in charge of the Affirmative

Action Plan. Messner testified that he was not consulted at all in connection with the Griffin promotion and was unaware at the time that Nist and Beck had promoted Griffin because of his race.

C. MCCU Promotion Claim: Retaliation

Given the question presented by Duquesne Light in its Petition, it is unnecessary to set forth the factual background of the retaliation claim. The Court of Appeals very briefly summarized that evidence in holding that the jury's verdict finding retaliation was supported by sufficient evidence. Petition, at 7a.

COUNTERARGUMENT

I.

THE TRIAL COURT CORRECTLY APPLIED THIS COURT'S DECISIONS IN *JOHNSON V. TRANSPORTATION AGENCY, SANTA CLARA COUNTY*, 480 U.S. 616 (1987), AND *PRICE WATERHOUSE V. HOPKINS*, 490 U.S. 228 (1989).

The Court of Appeals in its "Not-For-Publication" Memorandum Opinion noted that Duquesne Light had difficulty in coming to grips with the central fact of this case, that the promotion of the black Griffin to the vacant

MCE position was not done pursuant to Duquesne Light's Affirmative Action Plan:

> The core flaw in Duquesne's argument is the fact that, although it sought to justify the March 1, 1988 promotion of James Griffin over plaintiff to the vacant position of Manager, Construction and Engineering ... on the grounds of affirmative action, there is testimony by the manager responsible for the disputed promotion decision that although Griffin's race was a determinative factor, the decision was NOT made pursuant to Duquesne's affirmative action plan. Duquesne attempted unsuccessfully to nuance the problem at oral argument. We conclude that the jury was entitled to rely on its manager's testimony.
>
> Memorandum Opinion, Petition for Writ of Certiorari, at 6a (emphasis in original).

The difficulty which Duquesne Light's counsel experienced at oral argument before the Court of Appeals in attempting to "nuance the problem" continues in this Court. The Petition for Writ of Certiorari does more than just "nuance" the problem. The Petition fails altogether to inform this Court that: (1) Duquesne Light's own manager at trial testified that the promotion was not made pursuant to the

Affirmative Action Plan at all; and (2) that the jury, asked in a special verdict interrogatory, so found.

There is a considerable body of federal caselaw which holds that discrimination on the basis of race outside the parameters of a valid affirmative action plan is never lawful. See, e.g., *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989); *Lilly v. City of Beckley*, 797 F.2d 191 (4th Cir. 1986); *Lehman v. Yellow Freight System, Inc.*, 651 F.2d 520 (7th Cir. 1981); *Wilmington Fire Fighters v. City of Wilmington*, 632 F. Supp. 1177 (D. Del. 1986). By admitting that its race-based promotion decision was not made pursuant to its Affirmative Action Plan, Duquesne Light placed itself hopelessly outside the narrow bounds of permissible affirmative action.

In its Petition, Duquesne Light purports to present as its first issue a question involving the relationship between the decisions of this Court in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), and *Price Waterhouse v Hopkins*, 409 U.S. 228 (1989), suggesting that it is unclear how a district court should conduct a trial and instruct a jury in a case in which the employer asserts that it has made a race-conscious decision pursuant to its Affirmative Action Plan and simultaneously asserts that it would not have promoted the complaining white employee in any event for some non-race related reason.

We submit that the present case is a remarkably poor

vehicle for the consideration of any such issue. Duquesne Light, by the testimony of its own manager, took the Affirmative Action Plan completely out of the case. The district court was unnecessarily generous in even submitting to the jury the question whether the race-based promotion was done pursuant to a valid affirmative action plan. The jury answered that special interrogatory in the negative, which was not in the least surprising given the testimony of the employer's executives.

Taking the question presented on the merits, however, there is nothing even questionable much less interesting in the District Court's handling of the case.

Under *Johnson v. Transportation Agency*, *supra*, this Court has held that when an employer defends an employment discrimination case by asserting that an admittedly race-based decision was made pursuant to an affirmative action plan, then the traditional burden-of-proof mechanisms of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), apply:

> Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. *The existence of such an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the*

> *employer's decision*, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid.
>
> 480 U.S. at 626 (emphasis supplied).

The District Court in fact instructed the jury that Duquesne Light first had the burden of coming forth with evidence "that it had an Affirmative Action Plan, that the employment decision was made pursuant to the affirmative action plan, and that the employment decision was authorized to be made under that plan." The district court then instructed the jury that plaintiff Claus would then have the burden of proving to the jury by a fair preponderance of the evidence that the Affirmative Action Plan was invalid. The District Court then gave a carefully-crafted instruction, drawn from the text of *Johnson v. Transportation Agency*, of what plaintiff would have to prove to demonstrate that an affirmative action plan was invalid.

It is difficult to understand in what manner Duquesne Light contends that the District Court failed to follow and apply *Johnson v. Transportation Agency*. And, of course, the fact of the matter is that Duquesne Light's affirmative action defense probably failed right at the first step, required by this Court, that the employer "articulate[] ... the plan as the basis for the employer's decision." Duquesne Light disavowed the plan as the basis for the decision, and the

jury doubtless took Duquense Light at its word on this point.

Duquesne Light also contended that quite apart from the question of race, it would not have promoted plaintiff Claus for other reasons. It claimed that Claus was a rigid and inflexible manager, and that he would be likely to exacerbate relationships with unions and unionized employees. This contention clearly turned the case into a "mixed motives" case within the meaning of this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in which this Court held that the employer has the burden of proof on the "mixed motive" factual question. Under this Court's decision in *Price Waterhouse*, of course, the plaintiff still has the burden of proving that he was discriminated against on the basis of race. The employer's burden of proof relates only to the non-racial mixed motive. The District Court, therefore, applied *Johnson v. Transportation Agency,* instructed the jury that plaintiff had the burden of proof to demonstrate the invalidity of the Affirmative Action Plan (assuming the jury found that the employer had articulated the plan as the basis for its actions), and then instructed the jury that on Duquesne Light's contention that it would not have promoted Claus in any event for non-race related reasons particular to Claus, Duquesne Light had the burden of proof.

The District Court, therefore, conducted this trial perfectly in accord with *Johnson v. Transportation Agency* and *Price Waterhouse v. Hopkins*. Frankly, we do not even

understand or follow Petitioner's arguments to the contrary. Nor did the Court of Appeals, which rejected the argument in an opinion marked "Not-for-Publication."

II.

THIS COURT'S INTERPRETATION OF 42 U.S.C. § 1981 IN *PATTERSON V. MCLEAN CREDIT UNION*, 491 U.S. 164 (1989), HAS BEEN LEGISLATIVELY OVERRULED BY THE CIVIL RIGHTS ACT AMENDMENTS OF 1991. AN ISSUE INVOLVING THE APPLICATION OF THE HOLDING OF *PATTERSON V. MCLEAN* IS BY DEFINITION NOT WORTH REVIEWING.

This Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), interpreted 42 U.S.C. § 1981, holding that in a failure to promote case Section 1981 would not be violated unless there were such a difference between the plaintiff's existing position and the position to which the employee sought promotion so as to constitute a "new and distinct relation" between employer and employee. The courts of appeals had notable difficulty in applying this "new and distinct relation" test to promotion cases. In November, 1991, Congress specifically overruled *Patterson v. McLean Credit Union* in a provision of the Civil Rights Act Amendments of 1991, Pub. L. 102-166, Title I, § 101, Nov. 21, 1991, codified at 42 U.S.C. § 1981(b), (c). See

"Statutory Provisions Involved," *supra*.

Prior to this Court's decision in *Patterson*, the lower federal courts had experienced no difficulty in holding that 42 U.S.C. § 1981 encompassed claims of retaliation against an employee for having asserted rights protected by Section 1981. See, e.g., *Winston v. Lear-Siegler, Inc.*, 558 F.2d 266 (6th Cir. 1977); *Sisco v. J.S. Alberici Construction Co.*, 655 F.2d 146 (8th Cir. 1981); *London v. Coopers & Lybrand*, 644 F.2d 811 (9th Cir. 1981); *Pinkard v. Pullman-Standard*, 678 F.2d 1211 (5th Cir. 1981); *Goff v. Contintental Oil Co.*, 678 F.2d 593 (5th Cir. 1982); *Setser v. Novak Investment Co.*, 638 F.2d 1137 (8th Cir.), *cert. denied*, 454 U.S. 1064 (1984); *Choudhury v. Polytechnical Institute of New York*, 735 F.2d 38 (2d Cir. 1984); *Greenwood v. Ross*, 778 F.2d 448 (8th Cir. 1985); *Liotta v. National Forge Co.*, 473 F. Supp. 1139 (W.D. Pa. 1979), *aff'd in part, rev'd in part, remanded in part*, 629 F.2d 903 (3d Cir. 1980), *cert. denied*, 451 U.S. 970 (1981). Before *Patterson*, no federal court had even suggested that Section 1981 might not encompass retaliation claims.

After this Court's decision in *Patterson* in 1989, cases were presented in which the plaintiff in a case in which 42 U.S.C. § 1981 would not generally apply nevertheless asserted that his 42 U.S.C. § 1981 claim was valid because retaliation was alleged. See, e.g., *Williams v. First Union National Bank of North Carolina*, 920 F.2d 232 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 353 (1991)(retaliatory working conditions); *Carter v. South*

Central Bell, 912 F.2d 832 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2916 (1991) (retaliatory discharge); *Overby v. Chevron USA, Inc.*, 884 F.2d 470 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1306 (1991) and 113 S.Ct. 1270 (1991)(retaliatory discharge); *Mozee v. American Commercial Marine Service Co.*, 940 F.2d 1036 (7th Cir. 1991), *cert. denied*, 113 S.Ct. 207 (1993)(retaliatory discipline and discharge). All of these post-*Patterson* "retaliation" cases have a common denominator: they are cases in which the employer either discharged the employee, harassed the employee with respect to working conditions, or demoted the employee. The charge of "retaliation," in other words, was being used in a setting in which *Patterson* had either directly held (racial harassment) or in which the lower fedral courts thought *Patterson* had held (discharge, demotion) that Section 1981 did not apply. These cases, therefore, do not stand for the proposition that Section 1981 does not ever encompass retaliation. Rather, they stand for the much more limited proposition that a claim of "retaliation" cannot be used to make actionable under Section 1981 that which *Patterson* had indicated was not actionable: claims of racial harassment post-employment; claims of termination; claims of demotion; claims of discriminatory working conditions. No post-*Patterson* case has ever held, or even suggested, that this Court in *Patterson* had disapproved of the use of Section 1981 to remedy racially-based retaliation where the employer had refused to "make" a contract within the core meaning of Section 1981. And no federal court has ever held in the context of a failure to promote case which did satisfy the "new and distinct

relation" test of *Patterson* that a retaliation claim is not cognizable under Section 1981 as well.

The Court of Appeals carefully reviewed the factual record to determine whether the two promotion opportunities involved here -- the MCE and the MCCU positions - represented a significant enough step up the corporate ladder compared to Claus' existing position to satisfy the "new and distinct relation" test of *Patterson*. The Court of Appeals wrote:

> "While the issue is close, we are satisfied that the transition from plaintiff's existing job as an engineer to either of the other jobs would have involved significantly different responsibilities and relationships. Both of the promotions would have elevated Claus from a practicing engineer to the ranks of senior management, giving him supervisory responsibility over 250 employees in the case of the Manager of C&E position or over 105 employees in the case of the Manager CC & U position and endowing him with very substantial budgetary responsibility in either case. Such profound distinctions in day-to-day functions are clearly distinguishable from the marginal differences in power rejected in *Bennum [v. Rutgers State University*, 941 F.2d 154, 169 (3d Cir. 1991)], where the only difference between the academic ranks

> was the eligibility to vote on tenure decisions."
>
> Petition for Certiorari, at 8a.

Petitioner does not present to this Court the question whether the Court of Appeals was correct in holding that the "new and distinct relation" test was satisfied by the evidence in this case. For purposes of this Petition, therefore, it is a given that the *Patterson* test was satisfied and that Claus had valid Section 1981 claims for his non-promotion to the MCE position and for non-promotion to the MCCU position.

So the question actually presented becomes: Is 42 U.S.C. § 1981, as interpreted by this Court in *Patterson v. McLean Credit Union*, violated where an employee seeks promotion to a position, where the promotion position satisfies the "new and distinct relation" test of *Patterson*, and where the employee proves that he was denied the promotion in retaliation for his having filed a complaint with the EEOC alleging racial discrimination in an earlier promotion decision which also satisfied the "new and distinct relation" test of *Patterson*?

We suggest that there are two answers to this question:

1. Yes, 42 U.S.C. § 1981 is violated on those facts, even assuming that *Patterson v. McLean Credit Union* remained good law.

2. *Patterson v. McLean Credit Union* is no longer good law, has been legislatively overruled, and any question involving the applicability of *Patterson* to the facts of this case can have no importance whatever save to the parties to this case. The question is not therefore worthy of review.

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